

**COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NOS. BFA-10789-042, BFA-21316-42, BFA-20915-42,
BFA-14396-42, BFA-24365-42, BFA-24345-42 and BFA-11960-42
PERMIT NO. 898-0047
NON-COMPLIANCE NOS. 05-3530, 05-7614,
05-9464, 05-4817, 51-1441, 51-1294 and 05-3577
CESSATION ORDER NOS. 05-1824, 05-2021, 05-2043 and 05-0399**

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET,

PLAINTIFF,

VS.

SECRETARY'S FINAL ORDER

MELL COAL CORP. ,

DEFENDANT.

This matter is before the Secretary upon the Report and Recommended Order of the Hearing Officer, and the Secretary having considered the Report and Recommendation and any exceptions and responses, and being fully and sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Hearing Officer's Report and Recommendation entered in the record on __[2/13/04]_____, 2004, are **ADOPTED** and incorporated by reference and made a part herein, as if set forth verbatim.
2. The Defendant, Mell Coal Corp., **HAS WAIVED ALL RIGHTS** to a formal hearing to contest this matter.
3. As evidenced by the Secretary's Orders entered in File Nos. PHS-10789-50-V, PAC-21316-V, PAC-20915-V, PHS-14396-49-V, PAC-24365-V, PAC-24345-V,

PHS-11960-48-V, the Defendant **HAS VIOLATED** the conditions of Surface Coal Mining and Reclamation Operations Permit No. 898-0047, the Kentucky Surface Mining Laws and the regulations promulgated pursuant thereto, and the civil penalties imposed in those Secretary's Orders have not been paid by the Defendant.

4. Certificate of Deposit Bond No. 12466 securing Permit No. 898-0047 is **FORFEITED** pursuant to 405 KAR 10:050, Section 3(3) due to the Defendant's failure to pay civil penalties assessed for violations occurring on Permit No. 898-0047.

5. The Defendant, Mell Coal Corp., **IS INELIGIBLE** to receive another permit, begin another mining operation or have suspended permits or operations reinstated until such time as the requirements of KRS 350.130 have been satisfied and met.

6. This is a **FINAL AND APPEALABLE** order.

So **ORDERED** this the _____ day of _____, 2004.

_____/s/[6/2/04]
LAJUANA S. WILCHER, SECRETARY
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

APPEAL RIGHTS

In accordance with the provisions of KRS 350.0305 and KRS 350.032, any person or party aggrieved by a Final Order of the Secretary resulting from a hearing may obtain a review of the Final Order by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days after the entry or rendition of the Final Order, and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **SECRETARY'S ORDER** was, on this the ____ day of _____, 2004, mailed by first class mail, postage prepaid to:

Mell Coal Corp.
Dewey Belcher, Agent
P.O. Box 85
Elkhorn City, KY 41522

Mell Coal Corp.
Rt. 5, Box 477
Frankfort, KY 40601

and hand delivered to:

J. Alec Mackenzie
Environmental and Public
Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

DOCKET COORDINATOR

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ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET,

PLAINTIFF,

VS.

**HEARING OFFICER'S REPORT
AND
RECOMMENDED SECRETARY'S ORDER**

MELL COAL CORP. ,

DEFENDANT

* * * * *

This CONSOLIDATED MATTER is before the Hearing Officer following the failure of the Defendant, Mell Coal Corp (hereinafter "Mell Coal"), to appear at a Show Cause Hearing scheduled for June 4, 2003. Based upon the record of this matter, the Hearing Officer hereby makes the following Findings of Fact, Conclusions of Law and Recommendations.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On March 27, 2003, the Environmental and Public Protection Cabinet filed an Administrative Complaint against Mell Coal in which it sought the forfeiture of the certificate of deposit bond no. 12466 that serves as performance bond on Permit No. 898-0047 for unpaid civil penalties assessed on that permit. The Cabinet alleged in its

Administrative Complaint that civil penalties in the amount of twenty-six thousand nine hundred thirty dollars (\$26,930) were assessed by Final Orders of the Secretary entered in File Nos. PHS-10789-50-V, PAC-21316-V, PAC-20915-V, PHS-14396-49-V, PAC-24365-V, PAC-24345-V, PHS-11960-48-V, based on violations cited in the above-referenced Notices of Non-Compliance and Cessation Orders, and that as of the date of filing the Administrative Complaint said civil penalties have not been paid. The Cabinet further alleged that under 405 KAR 10:050 § 3(3), the Cabinet is entitled to forfeit a performance bond, which in this case is secured by a certificate of deposit or cash –

Solely upon the permittee's failure to pay penalties or fines (if the reclamation requirements have been fully met) and retain the bond proceeds, or portion thereof as necessary to offset the penalty or fine owed (including administrative costs incurred by the Cabinet, but the Cabinet shall forfeit a bond under this circumstance only after the five (5) year liability period has expired;....

2. On April 4, 2003, the Office of Administrative Hearings issued and served on the addresses supplied in the Administrative Complaint a Summons and Order in which this matter was assigned to this Hearing Officer and in which the Defendant was ordered to appear for a Pre-Hearing Conference on May 7, 2003, at 3:00 p.m. EST.

3. As evidenced by a return receipt card (green card) in the file maintained by the Office of Administrative Hearings, the Summons and Order were personally served on the Defendant's agent, Dewey Belcher, by certified mail, postage prepaid and return receipt requested. Mell Coal accepted service on April 7, 2003.

4. In light of the foregoing, service of the Administrative Complaint and Administrative Summons was accomplished in conformity with the Cabinet's regulations governing service of an Administrative Summons and was therefore proper. 400 KAR 1:030, Section 1(2) and 405 KAR 7:091, Section 5.

5. Mell Coal failed to file an answer or other responsive pleading as required by 405 KAR 7:092, Section 5(3)(b).

6. On May 7, 2003, the Hearing Officer conducted a Pre-Hearing Conference as scheduled in the Summons and Order. Hon. J. Alec Mackenzie appeared for the Cabinet. Mell Coal did not appear as required under the Administrative Summons and Order. Since Mell Coal was not present or represented by counsel, the Cabinet requested that the Hearing Officer enter an Order for Mell Coal to appear and show cause as to why a Hearing Officer's Report and Recommended Secretary's Order adverse to its interests should not be entered.

7. On May 13, 2003, a Show Cause Order was entered and served ordering Mell Coal to appear at the Final Pre-Hearing Conference on June 4, 2003 and show cause why it should not be deemed to have waived its right to an Administrative Hearing. The Order for Show Cause was properly served on the Defendant in conformity with the Cabinet's regulations governing service of documents or other pleadings. 400 KAR 1:030, Section 2.

8. On June 4, 2003, the Hearing Officer conducted a Show Cause Hearing. No one appeared for Mell Coal to show cause why it should not be deemed to have waived its right to a hearing under 405 KAR 7:092, Section 5. At that time, the Cabinet stipulated that it was only seeking to forfeit the bond in issue for the civil penalties of twenty-six thousand nine hundred thirty dollars (\$26,930) that were assessed by Final Orders of the Secretary entered in File Nos. PHS-10789-50-V, PAC-21316-V, PAC-20915-V, PHS-14396-49-V, PAC-24365-V, PAC-24345-V, PHS-11960-48-V, and further stated that it was no longer seeking to forfeit the bond for the additional penalties

and interest set forth in Paragraph 14 of its Administrative Complaint filed on March 27, 2003. The Cabinet further stipulated that all reclamation requirements on Permit No. 898-0047 had been met, and the five-year liability period set forth in 405 KAR 10:040, Section 2(4)(c) and 405 KAR 10:020, Section 3(2) had expired. At the conclusion of the show cause hearing, the Hearing Officer, pursuant to 405 KAR 7:092 Section 5(5), concluded that Mell Coal had not satisfied the terms of the Show Cause Order and accordingly determined that a report and order finding Mell Coal in default should be entered. The Hearing Officer then requested the Cabinet to tender a proposed Report and Secretary's Order. The proposed Report and Order was tendered by the Cabinet on January 5, 2004.

9. In light of the foregoing, the Hearing Officer concludes as a matter of law that Mell Coal has admitted the allegations made by the Cabinet in its Administrative Complaint and has failed to demonstrate why a Secretary's Order adverse to its interests should not be entered granting the Cabinet the relief it requested in its Administrative Complaint.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the Secretary enter the attached Order granting the Cabinet the following relief:

1. Mell Coal is adjudged to be in violation of the provisions of Permit No. 898-0047 and the Kentucky Surface Mining Laws;
2. Certificate of Deposit Bond No. 12466 securing Permit No. 898-0047 is hereby forfeited pursuant to 405 KAR 10:050, Section 3(3) for failure to pay civil

penalties totaling twenty-six thousand nine hundred thirty dollars (\$26,930) assessed for violations occurring on Permit No. 898-0047: and

3. Mell Coal is ineligible to receive another coal mining permit or begin future operations in Kentucky, until it has complied with the requirements of the Kentucky Surface Mining Laws.

SO RECOMMENDED this the _____ day of _____, 2004.

____//s//[2/13/04]_____

JAMES L. DICKINSON
HEARING OFFICER
Office of Administrative Hearings

EXCEPTION RIGHTS

Pursuant to KRS 350.0301 any party may file exceptions to this Report and Recommendation within fourteen (14) days of service of this Report. A party may file a Response to any Exceptions within twenty-one (21) days of service of this Report. The Secretary will then consider this Report, any Exceptions, any Responses and the recommended Order and decide this case.

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2004, a true and accurate copy of the foregoing **HEARING OFFICER'S REPORT AND RECOMMENDED SECRETARY'S ORDER** was mailed, postage prepaid, to:

Mell Coal Corp.
Dewey Belcher, Agent
P.O. Box 85
Elkhorn City, KY 41522

Mell Coal Corp.
Rt. 5, Box 477
Frankfort, KY 40601

and hand-delivered to:

J. Alec Mackenzie
Environmental and Public
Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

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